

APPENDIX A

The pertinent provisions of Rule 56 of the Federal Rules of Civil Procedure concerning summary judgment are as follows:

"(c) Motion and Proceedings Thereon. . . . The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

* * * * *

"(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. *When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but, his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.*

"(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

APPENDIX B

Pl X #1 id 4-17-61 CP

MIDAS, INC. FRANCHISE

AGREEMENT made at Chicago, Illinois, as of
..... between MIDAS, INC., an Illinois
corporation (herein called "MIDAS"), and
..... (herein called "SHOP OWNER").

Midas is engaged in the business of selling at wholesale automotive exhaust system parts in connection with (a) its trade name, trademark and service mark "MIDAS", (b) marks which include the word "MIDAS", (c) the design of signs employed in authorized shops, as well as (d) certain other marks of Midas — (all of which are herein called "Proprietary Marks").* These products are sold and installed only by authorized "MIDAS" shop owners operating specialty automotive exhaust system installation shops known as "MIDAS MUFFLER SHOPS". Through advertising, merchandising and selling these products, and promoting the services in selling and installing them, Midas has built up a valuable good will in its products and services, the word "MIDAS", and the Proprietary Marks. The success of Midas and of all authorized "MIDAS" shop owners depends upon the continuation of this good will and upon the continued marketing of a fine product, adherence to the highest standards of business conduct on the part of Midas and all authorized shop owners, and the maintenance by the shop owners of prompt, efficient, satisfactory and courteous service to the public.

*Some of the Proprietary Marks are registered in the United States Patent Office under Nos. 620322, 641711, 651091, 651747, 655353, 657036, 657037, 657051, 657128, 657604, 661021, 661321, 661827, 673083, 674939, 678396, 681974; additional applications for registration are pending.

In order to assist the authorized "MIDAS" shop owners to get started in business and to achieve maximum results, Midas makes available to all shop owners advice, information, experience, guidance and know-how with respect to management, financing, merchandising and service in the "MIDAS MUFFLER SHOPS", and Midas employs various other means to assist the authorized "MIDAS" shop owners to achieve success in their businesses.

In order for Midas and the authorized "MIDAS" shop owners to obtain the maximum benefits from the Midas advertising, good will and merchandising techniques, it is essential that each shop owner possess the qualifications, personnel, facilities and capital requisite to cultivating and developing the market to its full potential in his locality, and each shop owner must assume and carry out the obligation and responsibility for thus cultivating and developing the market. In this connection, Midas has entered into this Agreement in reliance upon, and in recognition of, the fact that

will have the full managerial responsibility and authority for the management and operation of the Shop Owner's business.

IN CONSIDERATION of the foregoing and of the mutual agreements contained herein, Midas and Shop Owner agree as follows:

1. *License.* So long and only so long as this Agreement shall remain in force, Midas grants to Shop Owner, as an authorized "MIDAS" shop owner, the non-transferable right and license to market and sell at retail, when installed in patron's vehicle by Shop Owner, Midas' automotive exhaust system parts bearing the Proprietary Marks, purchased by Shop Owner from Midas, and to use the Proprietary Marks for services in connection therewith, at the following location:

2. *Agreements of Shop Owner With Respect to Midas' Name and Proprietary Marks.* (a) Shop Owner hereby acknowledges the validity of the Proprietary Marks and also acknowledges that the same are the property of Midas. Shop Owner shall not in any way do anything to infringe upon, harm or contest the rights of Midas in the Proprietary Marks or in any other mark or name which incorporates the name, "MIDAS". Shop Owner shall not use any mark or name other than as herein licensed in connection with the sale of genuine Midas automotive exhaust system parts. Shop Owner shall not place any name or mark, other than the names or marks originally appearing thereon, on any products or packages or other materials which Shop Owner obtains from Midas.

(b) Shop Owner shall not use the word "MIDAS" in its firm name or corporate name without having obtained the prior written approval of Midas; and, if such approval is granted, Shop Owner shall, upon the request of Midas at any time, promptly discontinue the use of the word "MIDAS" (or any similar word) in Shop Owner's firm name or corporate name and shall promptly take such steps as may be necessary or appropriate in the opinion of Midas to eliminate the word "MIDAS" from Shop Owner's firm name or corporate name.

(c) Shop Owner recognizes that the use by him of any of the Proprietary Marks, or of any other mark or name that incorporates the word "MIDAS", inures to the benefit of Midas and that any good will arising from such use by Shop Owner shall revert to Midas in the event this Agreement is terminated for any reason.

3. *Agreements of Shop Owner With Respect to Operation of Shop.* (a) Shop Owner may operate his shop under the designation "MIDAS MUFFLER SHOPS".

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(b) Shop Owner shall abide by all lawful and reasonable policies and regulations issued from time to time by Midas in connection with the operation of the shop and all other matters arising under this Agreement.

(c) Shop Owner shall furnish Midas with such statements, certificates, reports or other documents, pertaining to the operation of Shop Owner's shop and Shop Owner's compliance with the terms of this Agreement and the rules and regulations thereunder as Midas may from time to time request.

(d) Midas shall have the right, at reasonable times, to visit the shop for the purpose of inspecting the merchandise and equipment on hand, taking inventories, inspecting the nature and quality of goods sold and services rendered and the manner and method of operating the shop; in the event any of Shop Owner's inventory or business is located outside of the shop premises, Midas shall have similar rights with regard to the same.

4. *Warranties and Guarantees.* (a) There are no warranties, expressed or implied, made by Midas of the products sold under this Agreement other than the "Guarantee" which in printed form is furnished to the customer with each automotive muffler, and which "Guarantee" is made to the customer and not to Shop Owner. Shop Owner shall make no warranties or guarantees other than those contained in the "Guarantee".

(b) Shop Owner shall honor each "Guarantee" presented by a customer at Shop Owner's store in accordance with the terms thereof, irrespective of whether the muffler was purchased at that shop or from any other authorized Midas Muffler Shop.

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(c) Shop Owner shall comply at all times with Midas' policies then in force and effect concerning the Midas "Guarantee" program. Midas will honor for credit all acceptable guarantees with return of muffler plates, as currently allowed by Midas.

(d) After the termination of this Agreement, Shop Owner shall not, except at Shop Owner's own expense and without right of reimbursement from Midas, honor any "Guarantee". In order that each "Guarantee" that is issued is certain of being honored pursuant to its terms, Midas agrees that every "Guarantee" issued to Shop Owner's customers during the term of this Agreement shall be honored by Midas or by an authorized "MIDAS" shop owner.

(e) Shop Owner agrees to pay all invoices from Midas promptly according to their terms, without any set-off or other claim for replaced mufflers returned under the guarantee program, except to the extent that written credit memorandum has been issued therefor by Midas prior to the due date of outstanding invoices. If, after such payment is made, Shop Owner shall become entitled to any credit, as herein provided, for any returned mufflers, Midas agrees to credit the same against any future payments owing from Shop Owner or to reimburse Shop Owner promptly if Shop Owner is not then indebted to Midas and has no orders pending.

Shop Owner hereby waives any and all right of set-off or reimbursement or any other claims of any kind whatsoever against Midas by reason of Shop Owner having sold or installed any mufflers under said guarantees, except to the extent that Shop Owner may have replaced such mufflers and returned the original mufflers or muffler plates together with matching guarantee certificates to Midas and

written credit memorandum for the amount allowed has been issued by Midas to Shop Owner as hereinabove provided; reserving to Shop Owner his other rights as hereinabove provided.

5. *Shop Owner Not Agent of Midas.* This Agreement does not in any way create the relationship of principal and agent between Midas and Shop Owner, and in no circumstances shall Shop Owner be considered the agent of Midas. Shop Owner shall not act or attempt to act, or represent himself, directly or by implication, as agent of Midas or in any manner assume or create or attempt to assume or create any obligation on behalf or in the name of Midas, nor shall Shop Owner act or represent himself as an affiliate of any other authorized "MIDAS" shop owner.

6. *Termination.* (a) This Agreement may be terminated at any time without cause at the will of either party by notice to the other party given not less than thirty days prior to the termination date.

(b) Upon the termination of this Agreement for any reason, Shop Owner shall cease to be an authorized "MIDAS" shop owner and shall (i) promptly pay Midas all sums owing from Shop Owner to Midas without set-off or other claim for replacement of mufflers under the guarantee program except as hereinabove provided, (ii) immediately and permanently discontinue the use of the Proprietary Marks, the designation "MIDAS MUFFLER SHOPS", all similar names and marks, and any name or mark containing the designation "MIDAS", or any other designation indicating or tending to indicate that Shop Owner is an authorized "MIDAS" shop owner, (iii) immediately and permanently remove at Shop Owner's expense all signs containing the Proprietary Marks, the des-

ignation "MIDAS MUFFLER SHOPS", all similar names or marks, any name or mark containing the designation "MIDAS", or any other designation indicating or tending to indicate that Shop Owner is an authorized "MIDAS" shop owner, (iv) promptly destroy, or surrender to Midas, all stationery, letterheads, forms, printed matter and advertising containing the Proprietary Marks, the designation "MIDAS MUFFLER SHOPS", all similar names or marks, any name or mark containing the designation "MIDAS", or any other designation indicating or tending to indicate that Shop Owner is an authorized "MIDAS" shop owner, (v) immediately and permanently discontinue all advertising as an authorized "MIDAS" shop owner, (vi) promptly transfer to Midas, or at Midas' direction, each telephone number listed by Shop Owner under the designation "MIDAS", "MIDAS MUFFLER SHOPS", or any similar designation, and execute such instruments and take such steps as in the opinion of Midas may be necessary or appropriate to transfer each such telephone number, (vii) immediately and permanently discontinue the use of the word "MIDAS" in Shop Owner's firm name, corporate name or trade name and take such steps as may be necessary or appropriate in the opinion of Midas to change such names to eliminate the word "MIDAS" therefrom, (viii) sell all inventories on hand to Midas, at Midas' request, at the price then being charged by Midas to authorized "MIDAS" shop owners less freight and handling costs, and (ix) thereafter refrain from doing anything that would indicate that Shop Owner is or ever was an authorized "MIDAS" shop owner.

(c) Shop Owner agrees that an action at law for breach of contract would be an inadequate remedy for Shop Owner's breach of or failure to perform any of his obligations under the foregoing paragraph 6(b) hereof, and

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that, in the event of any such breach or failure to perform, Midas shall be entitled to relief in an action in equity to restrain the continuation by Shop Owner of any such breach and to compel Shop Owner to perform such obligations. Neither the foregoing remedy nor any other remedy exercised by Midas shall be deemed exclusive, but Midas shall be entitled cumulatively to exercise any and all remedies available in law or in equity, and its exercise of any one right or remedy shall not preclude it from exercising any other right or remedy. No waiver by Midas of any violation of any provision of this agreement shall constitute a waiver of any further violations nor a waiver of any other provision of this agreement.

7. *General Provisions.* (a) Shop Owner acknowledges that no representation or statement has been made to him in behalf of Midas that in any way tends to change or modify any of the terms of this Agreement or that in any manner prevents this Agreement from becoming effective and further acknowledges that there is no other agreement or understanding, either oral or in writing, between the parties affecting this Agreement or relating to the subject matter hereof, except with regard to policies in force and effect from time to time concerning the Midas "Guarantee" program, and except with respect to any agreement or understanding which has been reduced to writing and signed by the parties.

(b) If any Midas trademarked merchandise or equipment in the possession of Shop Owner at any time is levied upon or seized by any court officer, receiver, trustee in bankruptcy, assignee for benefit of creditors, or by any landlord or other person, or if said Midas trademarked merchandise shall have come into the possession of any other person other than in the usual course of Shop Own-

er's business, Shop Owner hereby agrees that Midas shall have the right, if permitted by the law governing the same, to repossess such Midas trademarked merchandise or equipment upon depositing with such person then having custody or possession thereof, an amount equal to Shop Owner's cost price thereof as shown on Midas invoices, which amount shall be held by such person in lieu of such trademarked merchandise or equipment. Shop Owner further agrees to execute any further documents and perform any further acts which may be required by law for carrying out this provision.

(c) This Agreement terminates and supersedes all prior Midas, Inc. license and sales agreements, if any, between the parties hereto, except that this Agreement shall not operate to cancel any of Shop Owner's orders placed with Midas pursuant to the provisions of any license and sales agreement terminated and superseded hereby, or impair or affect any existing obligation of Shop Owner to Midas.

(d) This Agreement shall inure to the benefit of the successors and assigns of Midas. The interest of the Shop Owner in this Agreement is personal and shall not be assigned, transferred, shared or divided in any manner by the Shop Owner, and, if Shop Owner is a corporation, the shares of stock of Shop Owner shall not be sold, pledged, hypothecated, assigned or transferred so as to change the controlling interest therein without the prior written consent of Midas.

(e) In the event any provision of this Agreement shall be determined to be invalid or unenforceable and prohibited by the laws of the State or place where it is to be performed, this Agreement shall be considered divisible as to such provision, and such provision shall be inoperative and shall not be part of the consideration moving from

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either party to the other, and the remaining provisions of this Agreement shall be valid and binding and of like effect as though such provision were not included herein.

(f) Any notice required or permitted by this Agreement, or given in connection herewith, shall be in writing and may be by personal delivery or by first-class certified mail, postage prepaid. Notices to Midas shall be delivered to or directed to Midas, Inc., 4101 West 42nd Place, Chicago 32, Illinois. Notices to Shop Owner shall be delivered to any person designated in this Agreement as having full managerial authority and responsibility for the operating management of Shop Owner or directed to Shop Owner at Shop Owner's principal place of business as described in paragraph 1 hereof.

(g) The parties intend this Agreement to be executed as an Illinois agreement and to be construed in accordance with the laws of the State of Illinois.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the date first above written.

Attest:

MIDAS, INC.

By

Secretary

President or Vice President

Attest:

Secretary

_____, Shop Owner

By

By